U.S. Department of Justice
Office of Legal Counsel

Office of the Deputy Assistant Attorney General *Washington, D.C. 20530*

October 22, 2002

MEMORANDUM FOR ADAM F. GREENSTONE
GENERAL COUNSEL, OFFICE OF ADMINISTRATION
EXECUTIVE OFFICE OF THE PRESIDENT

Re: Constitutionality of Public Law 107-240, Which Purports To Require the Executive Branch To Procure Virtually All Printing Needs Through the Government Printing Office

You have asked our opinion regarding the constitutionality of section 4 of Public Law 107-240 ("H.J. Res. 122"). That section amends section 117 of Public Law 107-229 ("the Continuing Resolution") in an apparent effort to make still more clear Congress's intent that the Executive Branch may not use funds appropriated under the Continuing Resolution in violation of section 501 of title 44 of the United States Code. Section 501, in turn, requires all executive agencies (among other entities) to procure virtually all authorized printing from the Government Printing Office ("GPO"). For constitutional purposes both the original and amended section 117 are legally indistinguishable from section 207(a) of the Legislative Branch Appropriations Act, 1993, Pub. L. No. 102-392, 106 Stat. 1703, 1719 (1992) (previously codified at 44 U.S.C. § 501 note). This Office has previously concluded that section 207(a) is unconstitutional. Specifically, we concluded that section 207(a) "violate[d] the constitutional principles of separation of powers." *Involvement of the Government Printing Office in Executive Branch Printing and Duplicating*, 20 Op. O.L.C. 214, 221 (1996); *see also Government Printing Office Involvement in Executive Branch Printing*, 20 Op. O.L.C. 282 (1996).

Our reasoning was -- and continues to be -- as follows. Under 44 U.S.C. § 501, and hence under the amended Continuing Resolution, the GPO would perform executive functions. For example, the GPO controls the timing and the production of all printing work for the executive branch, and determines the form and style in which the printing or binding ordered by the executive branch is executed. *See* 44 U.S.C. § 1105; *see also id*. § 301. The GPO, however, is firmly under congressional control. This follows from the fact that the GPO and the Public Printer (who runs the GPO) are subject to supervisory control by the Joint Committee on Printing ("JCP"), *see, e.g.*, *id*. §§ 103, 305, which, in turn, is composed of members of Congress, *see id.* § 101. *See Bowsher v. Synar*, 478 U.S. 714, 730 (1986).

It is a basic tenet of separation of powers that Congress may not vest executive power in a body subject to its continuing control. "The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess." *Bowsher*, 478 U.S. at 726; *see also id*. at 733-34. Because Congress seeks to vest executive power in a body subject to congressional control through amended section 117 of the Continuing Resolution, that provision is unconstitutional.

Amended section 117 suffers from an additional, related constitutional problem. Section 501 empowers the JCP to make exceptions from the general requirement that the executive branch use the GPO. To the extent that the power to make such exceptions is legislative, section 501 (and hence the amended section 117) violates the requirement that legislative action must comply with the procedure laid out in the Constitution: passage by both houses and presentment to the President. *See INS v. Chadha*, 462 U.S. 919, 951 (1983); *see also* 20 Op. O.L.C. at 226.

Finally, we note that executive branch officers would face no realistic risk of criminal or civil liability for entering into contracts consistent with our opinion (and in derogation of the amended Continuing Resolution). This issue is discussed in our prior opinion referenced above. *See* 20 Op. O.L.C. at 227-31. There we explained that with the exception of *qui tam* suits, only the Department of Justice could bring civil or criminal actions against such officials, and that the actions of the Department of Justice would necessarily be in accord with the views expressed by the President in his signing statement[1] and the position of this Office. *See id.* at 228. As a result, a contracting officer who acts consistently with our opinion runs no risk of being subjected to an action initiated by the Department.

As for *qui tam* suits, such suits (brought under the False Claims Act) would almost certainly fail because the contracting officer would not have falsely certified that a contract was paid in accordance with law, *i.e.*, given the executive branch's interpretation of the law, the officer would truthfully certify that payment of the contract was in accordance with law. *See id.* at 230. Similarly, a *qui tam* suit would also almost certainly fail because of the government's knowledge of the facts underlying the allegedly false claim. In particular, prior government knowledge of the facts underlying an allegedly false claim can negate the scienter required for a violation of the False Claims Act. *See United States ex rel. Becker v. Westinghouse Savannah River Company*, 2002 WL 31133257 (4th Cir. Sept. 27, 2002) (so holding); *Shaw v. AAA Eng'g & Drafting, Inc.*, 213 F.3d 519, 534 (10th Cir. 2000) (same); *United States ex rel. Durcholz v. FKW, Inc.*, 189 F.3d 542, 543 (7th Cir. 1999) (same); *United States ex rel. Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1157 (2d Cir. 1993) (same); *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991) (same). As the Seventh Circuit explained,

> [i]f the government knows and approves of the particulars of a claim for payment before that claim is presented, the presenter cannot be said to have knowingly presented a fraudulent or false claim. In such a case, the government's knowledge effectively negates the fraud or falsity required by the FCA . . . . We decline to hold [defendant] liable for defrauding the government by following the government's explicit directions.

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[1] Although President Bush signed the Continuing Resolution into law, he issued a signing statement in which he specifically expressed his view that section 117 violated the constitutional principles of separation of powers and, therefore, was inoperative. *See* Statement by President George W. Bush Upon Signing H.J. Res. 111, 2002 WL 31161651 (Sept. 30, 2002).

Durcholz, 189 F.3d at 545 (emphasis added). Importantly, the only circuit that declined to adopt the government knowledge defense did so in the context of a claim brought by the government (as opposed to a *qui tam* action). *See United States v. Southland Mgmt. Corp.*, 288 F.3d 665, 686 n.24 (5th Cir. 2002) ("We emphasize that we need not, and do not, address today the availability of a 'government knowledge' defense in *qui tam* actions."). Even in the government-suit context, moreover, the court stated that it would permit a government knowledge defense "where the falsity of the claim is unclear and the evidence suggests that the defendant actually believed his claim was not false because the government approved and paid the claim with full knowledge of the relevant facts." *Id*. at 686. Certainly such a defense would also be available where, as here, the Executive Branch has specifically addressed the claim and determined it to be legal.

In conclusion, the amended section 117 violates constitutional principles of separation of powers in two ways. First, it vests executive power in a body subject to congressional control. Second, it would allow for the exercise of legislative power in a manner inconsistent with bicameralism and presentment. Accordingly, we conclude that the amended section 117 is unconstitutional. In addition, executive branch officers would face no realistic risk of liability for failing to abide by section 117. For a more detailed examination of these issues, please consult our 1996 opinion, which we have attached. Please let us know if we may be of further assistance in this matter.

Sheldon Bradshaw
Deputy Assistant Attorney General